UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

vs. **8:18-CR-008 (MAD)**

MOAZE IBRAHIM,

Defendant.

APPEARANCES: **OF COUNSEL:**

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Mae A. D'Agostino, U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

On February 14, 2019, Defendant moved pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure to suppress evidence obtained from Defendant's iPhone because (1) Border Patrol did not have probable cause to take the iPhone and (2) even if they did have probable

cause, they acted with unreasonable delay in securing the warrant. *See* Dkt. No. 59-2 at 6-9. Alternatively, Defendant requests an evidentiary hearing on the motion to suppress. *See id.* at 9. The Government filed its Opposition to that motion on February 15, 2019, arguing that (1) there was no delay in securing the warrant, (2) the duration of the seizure for twenty-one days was reasonable, and (3) any delay that the Court may find does not require suppressing the evidence. *See* Dkt. No. 61 at 4-8.

For the following reasons, the motion to suppress is denied in its entirety.

II. BACKGROUND[1]

On December 29, 2017, Defendant was stopped in his vehicle by Border Patrol Agent Mark Grabda near the border between the United States and Canada. *See* Dkt. No. 59-1 at ¶ 2; Dkt. No. 59-3 at ¶¶ 6-9. Agent Grabda stopped Defendant after being informed by his sector dispatch that a black SUV with Virginia license plates was headed to Glass Road (a popular location for illegal border crossing), and that an individual wearing a hat and backpack was photographed walking south from Canada at the same location. *See* Dkt. No. 59-5 at 2-3. Agent Grabda responded to the area and found a vehicle that matched dispatch's description traveling northbound on Glass Road toward the border. *Id.* at 3. Approximately three minutes later, Agent Grabda observed the same vehicle heading southbound on Glass Road. *Id.*

Agent Grabda stopped the vehicle and confirmed that it had a Virginia license plate before he approached to request documents from its occupants. *Id.* At this point, Agent Grabda discovered that the passenger of the vehicle was an alien unlawfully present in the United States who matched the description of the individual who was photographed walking south from the

[1] The facts relied upon in this Memorandum-Decision and Order were taken from Defendant's Declaration (Dkt. No. 59-1) and exhibits in support of the Motion to Suppress (Dkt. Nos. 59-3, 59-4, 59-5).

border. *Id.* Agent Grabda arrested the passenger and asked Defendant to follow him to the station, where Defendant was arrested. *Id.* at 3-4. Upon Defendant's arrest, Border Patrol agents seized Defendant's iPhone. *See* Dkt. No. 59-1 at ¶ 4.

On January 10, 2018, a federal grand jury indicted Defendant on one count of transporting an alien in violation of 8 U.S.C. § 1324(a)(1)(A)(ii). *See* Dkt. No. 6. Magistrate Judge Gary L. Favro issued a warrant to search the data on Defendant's iPhone on January 19, 2018. *See* Dkt. No. 59-4 at 1. On January 30, 2018, the data was forensically extracted from the iPhone, and the phone was retained as evidence. *See* Dkt. No. 61 at 4.

Defendant was detained from the time of his arrest until February 19, 2019, when Magistrate Judge Favro ordered his release on a $5,000 bond. *See* Dkt. No. 59-1 at ¶ 6; Dkt Nos. 64-65. Defendant has never consented to a search of his iPhone. *See* Dkt. No. 59-1 at ¶ 7.

III. DISCUSSION

A. Legal Standard

The Fourth Amendment protects the "right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV. "The touchstone of . . .[the] . . . analysis under the Fourth Amendment is always the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) (internal quotation marks omitted). This reasonableness inquiry generally entails "assessing, on the one hand, the degree to which [a seizure] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Virginia v. Moore*, 553 U.S. 164, 171 (2008).

The Supreme Court has held that a case-by-case balancing of all factors bearing on the reasonableness of a seizure is not usually necessary when a seizure is justified by probable cause

because, as a general matter, "probable cause to believe the law has been broken outbalances private interest in avoiding police contact." *Whren v. United States*, 517 U.S. 806, 818 (1996) (internal quotation marks omitted). At the same time, not every search or seizure justified by probable cause necessarily satisfies the Fourth Amendment. *See id.* at 818 (holding that a search or seizure supported by probable cause may be unreasonable in violation of the Fourth Amendment if it is "conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests - such as, for example, seizure by means of deadly force, unannounced entry into a home, entry into a home without a warrant, or physical penetration of the body") (citations omitted).

B. Seizure of the iPhone

In the present matter, Defendant argues that before the Government applied for a search warrant, "there was no determination that the seizure of the iPhone was supported by probable cause" and there was "no concrete information establishing the use of the iPhone in connection with any case specific activity." *See* Dkt. No. 59-2 at 6. However, the record shows that the Government had more than sufficient information to establish probable cause that the iPhone would contain evidence relevant to Defendant transporting an illegal alien. As noted in the Search Warrant Application, individuals who cross the border illegally often use cell phones for the GPS function, camera, and to communicate with someone to pick them up once they are in the United States. *See* Dkt. No. 59-3 at ¶ 13. Defendant's iPhone was seized at the Border Patrol station, in connection with his arrest, after an alien illegally present in the United States was found to be a passenger in his vehicle. *See id.* at ¶ 12. At the time of his arrest, Defendant uttered "it is not alien smuggling because my friend asked for a ride so I picked him up." *See id.* Based

on this information, Border Patrol had probable cause to believe that the iPhone would contain evidence of the alleged crime. As such, the seizure of the iPhone was reasonable.[2]

Alternatively, Defendant argues that since the iPhone was seized before Border Patrol obtained a warrant, the seizure is only valid if "the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present." *See* Dkt. No. 59-2 at 6. The record clearly shows that Border Patrol seized Defendant's iPhone after arresting him at the station. *See* Dkt. No. 59-1 at ¶ 4. As a seizure incident to Defendant's arrest, Border Patrol did not need a warrant to seize the iPhone. It is well settled that the seizure of personal property incident to a valid arrest is not a violation of the Fourth Amendment: "once the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant[.]" *United States v. Edwards*, 415 U.S. 800, 807 (1974); *see also Illinois v. Lafayette*, 462 U.S. 640, 648 (1983) (holding that "it is not 'unreasonable' for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, in accordance with established inventory procedures"). Finally, and fatal to Defendant's motion, is the fact that the Border Patrol agents did not search Defendant's iPhone

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[2] Defendant does not dispute that there was probable cause for the vehicle stop and for his arrest. *See United States v. Harrison*, 606 F.3d 42, 45 (2d Cir. 2010) (finding that "the Fourth Amendment requires that an officer making a traffic stop have probable cause or reasonable suspicion that the person stopped has committed a traffic violation or is otherwise engaged in or about to be engaged in criminal activity") (citation and internal quotation marks omitted). Here, the record clearly shows that there was probable cause for Agent Grabda to stop Defendant's vehicle and for Defendant's arrest. *See* Dkt. No. 59-5 at 2-3 (discussing how prior to the stop and arrest, Agent Grabda: (1) received information from his sector dispatch about Defendant's vehicle heading towards the border, (2) learned that two ground intrusion detection devices had been set off at the border, (3) learned of a photograph of an individual crossing into the United States on foot with a hat and backpack, (4) observed Defendant's vehicle, which matched dispatch's description, heading to the border and a few minutes later heading away from the border, and (5) confirmed that the license plate matched dispatch's description).

prior to obtaining a search warrant, in compliance with *Riley v. California*, 573 U.S. 373, 390 (2014).

C. Delay in Obtaining a Search Warrant

Even if Border Patrol had probable cause to seize the iPhone, Defendant argues that the seizure became unconstitutional because there was "'unreasonable delay in securing a warrant.'" *See* Dkt. No. 59-2 at 6 (quoting *United States v. Martin*, 157 F.3d 46, 54 (2d Cir. 1998)). The Second Circuit considers several factors to determine whether the delay in obtaining a search warrant is reasonable, specifically: the length of the delay, the significance of the intrusion on the person's property and liberty interests, and whether the person consented to the seizure. *United States v. Howe*, 545 Fed. Appx. 64, 66 (2d Cir. 2013). Additionally, the court "analyzes the government's interest in seizing the property, and balances the competing interests." *Id.*

Reviewing these factors, the Court finds that the twenty-one day delay to secure a search warrant in this case was not unreasonable. Courts have upheld delays of similar durations of time where the circumstances show that the delay was reasonable. *See United States v. Matthews*, No. 18-CR-124, 2018 WL 2277839, *4 (S.D.N.Y. May 17, 2018) (finding a seventeen day delay to be reasonable); *United States v. Loera*, 333 F. Supp. 3d 172, 187 n.6 (E.D.N.Y. 2018) (finding a fifteen day delay reasonable because "[c]ourts have routinely upheld periods similar to the . . . delay here between procuring the information and searching it, where, as here, law enforcement's retaining the thing to be searched did not interfere with defendant's ability to use it and where the delay included weekends and holidays"); *see also Howe*, 545 Fed. Appx. at 65 (finding a thirteen month delay to be "quite lengthy" but "not constitutionally unreasonable" based on the circumstances). In this case, the delay was particularly understandable since the span of time included New Year's Day and two weekends right after the holidays, which would presumably

make it more difficult to obtain a warrant. *See United States v. Martin*, 157 F.3d 46, 54 (2d Cir. 1998) (finding an eleven day delay to be reasonable that "included two weekends and the Christmas holiday, which could explain the difficulty in promptly obtaining the warrant"); *United States v. Okparaeka*, No. 17-CR-225, 2018 WL 3323822, *7 (S.D.N.Y. July 5, 2018) (finding a nineteen day delay to be "relatively short" and reasonable, particularly because it included "three weekends as well as the Passover holiday").

Turning to the other factors, the Court finds that Defendant did not have a strong possessory or liberty interest in the iPhone. In the Motion to Suppress, Defendant admits that his short term interest in the iPhone was weakened by the fact that he was in custody during the twenty-one day delay. *See* Dkt. No. 59-2 at 8. The Court agrees that Defendant's incarceration weakened his possessory interest in the iPhone. *See Segura v. United States*, 468 U.S. 796, 813 (1984) (Burger, C.J.) (plurality opinion) (finding that a defendant's possessory interests in their apartment were "virtually nonexistent" when they "were under arrest and in the custody of the police throughout the entire period the agents occupied the apartment"); *United States v. Sullivan*, 797 F.3d 623, 633 (9th Cir. 2015) (stating that "[w]here individuals are incarcerated and cannot make use of seized property, their possessory interest in that property is reduced"). Additionally, Defendant never sought the return of his phone, thereby diminishing his possessory interests even more. *See United States v. Johns*, 469 U.S. 478, 487 (1985) (finding that a delay did not adversely affect the defendants' Fourth Amendment interests because there was probable cause to seize the property and the defendants never sought return of the property). Finally, the delay did not infringe on Defendant's liberty interest, as he was incarcerated the entire time. *See Martin*, 157 F.3d at 54 (finding reasonable delay where the seizure did not "effectively restrain the liberty interests of the person from whom the property was seized, as is the case where officers seize a

traveler's luggage and thereby cause 'disruption of his travel plans'") (citing *United States v. Place*, 462 U.S. 696, 708 (1983)).

Defendant argues that the Government did not have a strong interest in holding the iPhone as evidence because, "after three weeks, the government had no case-specific information establishing that the iPhone would have evidence on it pertaining to any offense." *See* Dkt. No. 59-2 at 8. The Government does, however, have a strong interest in securing the nation's borders, *see United States v. Martinez-Fuerte*, 428 U.S. 543, 551 & 562 (1976), and had probable cause to believe that the iPhone was involved in a breach of those borders. Finally, Defendant argues that since the Search Warrant Application included mostly "speculative" information, there is no evidence that the delay was excused by the need for continuous police investigation. *See* Dkt. No. 59-2 at 7-8. Regardless of the need for further investigation, the reasonableness of a delay is determined by reviewing the totality of the circumstances surrounding the delay. Here, considering all of the facts and weighing the deprivation of Defendant's interests against the Government's interests, the Court finds that the twenty-one day delay in obtaining the search warrant was reasonable.

D. Request for Evidentiary Hearing

"A defendant who is moving to suppress evidence is not automatically entitled to an evidentiary hearing." *United States v. Harun*, 232 F. Supp. 3d 282, 285 (E.D.N.Y. 2017) (citing *United States v. Barrios*, 210 F.3d 355, 355 (2d Cir. 2000)). "'[A]n evidentiary hearing on a motion to suppress ordinarily is required if the moving papers are sufficiently definite, detailed, and nonconjectural' to enable a court to conclude that there are contested issues of fact." *Id.* (quoting *Jones v. United States*, 365 Fed. Appx. 309, 310 (2d Cir. 2010)) (citing *United States v. Pena*, 961 F.2d 333, 339 (2d Cir. 1992)). "Put differently, '[a]bsent a contested issue of material

fact, a defendant is not entitled to an evidentiary hearing.'" *Id.* (quoting *United States v. Pierce*, No. 06-CR-42, 2007 WL 1175071, *3 (E.D.N.Y. Apr. 19, 2007)).

"Moreover, there are requirements as to what sort of evidence can create a factual dispute that would necessitate an evidentiary hearing on a motion to suppress. It is well-settled that a hearing is not required if a defendant fails to support his factual allegations with an affidavit from a witness with personal knowledge." *Id.* at 285 (citing *United States v. Mottley*, 130 Fed. Appx. 508, 510 (2d Cir. 2005)).

In the present matter, although Defendant did include a sworn declaration, it fails to create a contested issue of fact. Even taking all of Defendant's facts as true, the delay in time between when the iPhone was seized and when the search warrant was obtained was reasonable. As such, the Court denies Defendant's request for a suppression hearing.

IV. CONCLUSION

After carefully reviewing the entire record in this matter, the parties' submissions and the applicable law, and for the above-stated reasons, the Court hereby

ORDERS that Defendant's Motion to Suppress (Dkt. No. 59) is **DENIED**; and the Court further

ORDERS that Defendant's request for a suppression hearing is **DENIED**; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on the parties in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: February 25, 2018
Albany, New York

Mae A. D'Agostino
U.S. District Judge